

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 28, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2011AP2865-CR

Cir. Ct. No. 2008CF2157

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DELMARCO M. TURNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Dane County: NICHOLAS J. McNAMARA, Judge. *Affirmed.*

Before Lundsten, P.J., Higginbotham and Kloppenburg, JJ.

¶1 PER CURIAM. Delmarco Turner appeals a judgment convicting him of multiple felonies and an order denying his postconviction motion for a new trial. He claims: (1) trial counsel provided ineffective assistance by failing to challenge the timeliness of the trial; (2) trial counsel provided ineffective

assistance by failing to object to identification testimony; (3) the circuit court violated Turner's right to self-representation; and (4) the circuit court erred in excluding third party suspect evidence. For the reasons discussed below, we reject each of these claims and affirm.

BACKGROUND

¶2 The State charged Turner with three counts of armed robbery and one count each of armed burglary, possession of a firearm by a felon, and theft of movable property, each as a repeat offender, and all based upon an incident in which three men and one woman forced their way into a residence where they took cash, credit cards, jewelry, a gun and other items from the residents at gunpoint. One of the robbers had three gold teeth and wore a brown jacket, and another one wore a stocking mask over braided hair. The credit card taken during the robbery was used a few hours later at a truck stop in Illinois. The victims were able to identify several of the robbers, including Turner, who was wearing a brown jacket, from the truck stop's surveillance video.

¶3 Turner, who began serving a sentence in Missouri while the crime was still being investigated, filed a request for speedy disposition pursuant to the Interstate Agreement on Detainers (IAD) on October 29, 2009. At a trial held in March 2010, the jury acquitted Turner on two counts and failed to reach a verdict on the remaining counts, resulting in a mistrial on those counts. At a second trial held in June 2010, Turner was convicted on the remaining four counts. We will set forth additional facts relevant to the issues on appeal in our discussion below.

STANDARD OF REVIEW

¶4 Claims of ineffective assistance of counsel present mixed questions of law and fact. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). We will not set aside the circuit court’s findings about counsel’s actions and the reasons for them unless they are clearly erroneous. *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel’s conduct violated the defendant’s constitutional right to the effective assistance of counsel is ultimately a legal determination, which this court decides *de novo*. *Id.*

¶5 Our review of a claim that a defendant has been denied the right to self-representation is similarly subject to a mixed standard of review. We will independently determine, as a question of constitutional fact, whether a defendant has validly waived the right to counsel. *State v. Imani*, 2010 WI 66, ¶19, 326 Wis. 2d 179, 786 N.W.2d 40. However, whether a defendant has the necessary competence to proceed pro se is treated as a question of fact subject to the deferential clearly erroneous standard of review. *Id.*

¶6 “Trial courts have broad discretion to admit or exclude evidence and to control the order and presentation of evidence at trial.” *State v. James*, 2005 WI App 188, ¶8, 285 Wis. 2d 783, 703 N.W.2d 727. We will set aside such discretionary determinations only if the trial court has failed to apply a relevant statute or to consider legally relevant factors, or has acted based upon mistaken facts or an erroneous view of the law. *Id.*

DISCUSSION

Timeliness of Trial

¶7 Because Turner filed a request for disposition under the IAD, the State was required to bring Turner to trial within 180 days of filing the request. WIS. STAT. § 976.05(3)(a) (2011-12).¹ The parties agreed before the circuit court that the 180-day deadline was April 27, 2010, and they agree on this appeal that the first trial occurred prior to that date and the second trial occurred after that date.

¶8 Turner contends that trial counsel provided ineffective assistance for failing to move to dismiss the charges on the ground that the second trial was untimely. The State asserts that it satisfied the IAD's speedy disposition provision by bringing Turner to trial in March 2010, and furthermore, that the circuit court properly extended the speedy disposition deadline after the mistrial for good cause, based upon the withdrawal of counsel, the difficulty in obtaining new counsel on short notice, and Turner's inability to adequately represent himself.

¶9 Regardless whether the speedy disposition provision was satisfied by the first trial, we are persuaded that the continuance was well within the circuit court's discretion. WIS. STAT. § 976.05(3)(a). It was entirely reasonable to afford successor counsel a sufficient opportunity to prepare for trial. Therefore, there was no IAD violation and counsel did not provide ineffective assistance by failing to raise the issue.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Identification Testimony

¶10 In the course of explaining how she had chosen a photograph of Turner for a photo array, Madison Police Detective Alix Olson testified that still photographs from a surveillance video of someone using the victim's credit card were "quite consistent" with Turner's driver's license photo. Turner argues that counsel provided ineffective assistance by failing to object to this testimony,² which the circuit court had barred prior to the first trial on the grounds that its probative value would be substantially outweighed by the danger of unfair prejudice from allowing the jury to hear the lay opinion of a law enforcement officer identifying the defendant. WIS. STAT. § 904.03; *see also United States v. LaPierre*, 998 F.2d 1460, 1465 (9th Cir. 1993).

¶11 Assuming for the purpose of this discussion that counsel should have objected to the officer's identification testimony, we conclude that Turner was not prejudiced by counsel's error. First, the detective did not testify that she was certain the man in the surveillance video was Turner; the point of her testimony was that she thought there was a sufficient resemblance to include Turner's picture in a photo array. It would have been obvious to the jury from the inclusion of Turner's photo in the array that the detective considered him a potential match, even without her explicitly saying so. Second, each of the victims independently identified Turner. Multiple corroboration from multiple witnesses lessens the significance of any one identification, even from a law enforcement officer.

² Turner also challenges the similar testimony of four other witnesses, but the State points out that his postconviction motion mentioned only Olson's testimony. Turner does not dispute the State's forfeiture argument in his reply brief, and we agree that he has failed to preserve his challenge to the testimony of the other witnesses. We note, however, that a similar prejudice analysis would apply to them.

Third, the jury had the opportunity to judge for itself whether Turner was the man in the surveillance video, which also lessens the individual impact of the detective's identification. Finally, given that Turner was found in possession of a gun taken during the robbery, we see no reasonable probability that exclusion of the detective's remark on Turner's appearance being "consistent" with the man in the surveillance video would have altered the outcome of the trial.

Self-Representation

¶12 The federal and state constitutions protect both a defendant's right to counsel and a defendant's right to self-representation. U.S. CONST. AMEND. VI; WIS. CONST. art. I, § 7; *Faretta v. California*, 422 U.S. 806, 818-21 (1975); *State v. Klessig*, 211 Wis. 2d 194, 201-03, 564 N.W.2d 716 (1997). It is well established that the right to counsel attaches automatically, and remains in effect throughout a criminal proceeding unless it is affirmatively waived in a knowing, voluntary, and intelligent manner by a defendant who is competent to do so. *Klessig*, 211 Wis. 2d at 203-04. As a logical corollary to that rule, the right to self-representation must be "clearly and unequivocally" invoked in conjunction with a waiver of the right to counsel. *Faretta*, 422 U.S. at 835; *see also Imani*, 326 Wis. 2d 179, ¶26 (defendant must validly waive right to counsel in order to invoke right to self-representation).

¶13 Here, after learning that the State Public Defender would not be able to appoint a new attorney in time for a scheduled trial date that would meet the original speedy disposition deadline, the circuit court asked Turner how he wished to proceed. Turner indicated that he would prefer to represent himself and keep the scheduled trial date rather than to delay the trial waiting for the appointment of a new attorney. The circuit court then engaged Turner in a brief colloquy to

determine his education level, why he wanted to represent himself, and whether he understood that representing himself would place him at a disadvantage. Turner indicated that he had an eighth-grade education and had difficulty reading; that he wanted to represent himself just “to get it done with;” that he understood a lawyer could help him and had no fundamental opposition to having one; and that he would accept a lawyer if one could be found in time for the scheduled trial date.

¶14 The circuit court denied Turner’s request to represent himself on the grounds that: (1) Turner’s waiver of counsel was not knowing and intelligent because Turner was operating under a mistaken belief that he had a right to have a second trial by the scheduled date, when the speedy disposition statute had already been satisfied by the first trial; (2) Turner’s waiver of counsel was not truly voluntary because he actually did still want an attorney, if one could be found quickly; and (3) Turner was not competent to try a felony case by the scheduled trial date, given that experienced attorneys had indicated that they did not feel able to prepare for trial in the time remaining.

¶15 The circuit court’s discussion demonstrates a reasoned application of the applicable law to the facts of record. First, it was reasonable for the circuit court to construe Turner’s request for self-representation as being conditioned upon having the trial within 180 days. Once the court determined that the deadline was no longer required or feasible, the precondition for Turner’s request disappeared. Moreover, contrary to Turner’s apparent belief, the standard for competence to represent oneself at trial is not the same as the standard for competence to waive one’s right to testify. A competence evaluation for self-representation requires an examination of the skills necessary to exercise the right being waived. Given Turner’s professed difficulty reading and limited education, we cannot conclude the circuit court’s factual finding as to Turner’s lack of

competence to prepare for a multiple-felony trial on short notice—a precondition of Turner’s waiver—was clearly erroneous.

Third Party Suspect Evidence

¶16 Evidence offered to cast blame for a charged offense onto another person is not relevant unless it has a “legitimate tendency” to show that the other person actually could be guilty. *State v. Denny*, 120 Wis. 2d 614, 623-25, 357 N.W.2d 12 (Ct. App. 1984). Under the legitimate tendency test, third party suspect evidence may be admissible if the defendant can show that: (1) the third party had a motive to commit the charged offense; (2) the third party had the opportunity to commit the charged offense; and (3) there is some evidence to directly connect the third person to the charged offense that is not remote in time, place or circumstance. *Id.* at 624; *see also State v. Scheidell*, 227 Wis. 2d 285, 295-96, 595 N.W.2d 661 (1999) (approving the *Denny* test).

¶17 Here, Turner sought to introduce evidence that police had received a tip from a confidential informant that a man named Dwayne Thomas had participated in the robbery wearing a stocking mask. Thomas had an associate, James Chancy, who had a history of armed robbery and who one police officer believed resembled the man in the brown jacket on the surveillance video. One of the victims told police that he at first thought that he recognized one of the robbers as Chancy, but, upon getting a better look at him, realized it was not him. Chancy’s wife also told one of the victims that she had heard talk that her husband might have been involved. Thomas and Chancy told police that they had been together at a woman’s house in another part of town at the time of the robbery, and the police verified their alibi. The circuit court excluded the evidence of what the

confidential informant and Chancy's wife said, on the dual grounds that it was hearsay and that it did not satisfy the legitimate tendency test.

¶18 Turner argues that testimony about what the confidential informant told police and what the victim told police that Chancy's wife told him she had heard were not hearsay because they were offered for the purpose of explaining why the police investigated someone other than Turner as being the suspect in the brown coat. However, if that was the only purpose for which the proffered testimony were offered, Turner does not explain what remaining admissible evidence there would be upon which the jury *could* rely for the truth of the matter asserted—that is, that either Thomas or Chancy were actually involved in the crime as either planners or participants.

¶19 Aside from the hearsay problem, we are satisfied that the circuit court's relevancy ruling was a reasonable application of *Denny* to the facts before it. As to Thomas, the confidential informant's tip suggested that he was the man in the mask, not the one with gold teeth wearing a brown jacket. Therefore, the only possible relevance of Thomas's alleged participation in the burglary would be to make it more likely that the man in the brown jacket was Thomas's associate Chancy, rather than Turner. However, none of the proffered evidence directly connected Chancy to the offense. Neither the confidential informant, nor Chancy's wife, claimed to have personal knowledge implicating Chancy. The stolen gun was found in Turner's possession, not Chancy's. And perhaps most notably, although several people thought that Chancy bore a resemblance to the burglar in the brown jacket, Turner did not proffer any evidence that Chancy had gold teeth, as did the robber and Turner.

¶20 Because we conclude that the second trial was timely, the detective's testimony identifying Turner as the man in the surveillance video was harmless, the circuit court's determination that Turner lacked the ability to represent himself at a multiple felony trial was not clearly erroneous, and the *Denny* evidence was properly excluded, we decline to reverse in the interest of justice.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

